ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

No. 88-6222

SCOTT WAYNE BLYSTONE, Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA, Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

For two reasons the Petition for Writ of Certiorari should be denied in the instant case. First, as we show in Part I, the Commonwealth's challenge for cause of prospective Juror Number 102 was properly granted by the trial court because her opposition to the death penalty demonstrated an inability to perform her duty as a juror. Second, as we show in Part II, the mandatory language of the Pennsylvania death penalty statute does not render said statute unconstitutional under the United States Constitution because adequate safeguards for defendant/petitioner are contained therein.

I.

The trial court in the case sub judice properly granted the Commonwealth's challenge for cause of prospective Juror Number 102 because her opposition to the death penalty demonstrated an inability to perform her duty as a juror. A recitation and review of the relevant voir dire testimony follow.

EXAMINATION BY MR. SOLOMON (District Attorney)

Q. Do you know of any reason why you should not or could not serve on this jury?
A. No.
Q. If, after hearing all the evidence in this case, you believe the defendant to be guilty of murder in the first degree, could you return such a verdict?
A. Yes.
Q. If, after all the evidence in this case and the law as his Honor, Judge Adams will give you, and as a member of this jury you believe that the death penalty is warranted, would you impose such a penalty?

A. Does that mean "capital punishment? I don't believe in that.
Q. That is the death penalty.
Q. Do you have a moral or religious belief against capital punishment?
A. I am a Baptist and I don't believe in capital punishment.
Q. Is it against your religious beliefs to support capital punishment?
A. Yes, it is.

MR. SOLOMON: Challenge for cause.
MR. WHITEKO: I would object to the challenge based on her answer.
JUDGE ADAMS: The Supreme Court has recently ruled that this is a legitimate reason to challenge for cause. I would overrule the objection.....

(See petitioner's A--143-144). (emphasis supplied by the respondent).

The trial court adequately explained the exclusion of Juror Number 102 (See petitioner's A--122-123):

> This court, as to Juror Number 102-Hattie M. Royster-had no difficulty in reaching the decision in that her attitude and manner as well as her words, indicated that she had personal and religious beliefs which prevent and substantially impair her performance and duty as a juror in accordance with the court's instructions and her oath. It is conceded that court's dismissal for cause was abrupt, and that more extensive questioning would have placed and Appellate Court in a better position to resolve the issue so far as the printed record is concerned, but this court is clearly of the opinion, based on the printed record as shown, and the attitude and manner of the juror as this court found it to be, that she did not meet the standards set forth and was properly excluded from the jury for cause.

The Pennsylvania Supreme Court properly held that the record indicated that Juror Number 102 could not carry out her duty to follow the law as the trial court instructed and, therefore, was properly excluded (See Petitioner's A--15-17). The respondent respectfully submits that the Pennsylvania State Courts' determination was proper.

A determination of whether to disqualify a prospective juror is made by the trial judge based on both that juror's answers as well as demeanor, and will not be reversed absent a palpable abuse of discretion. Commonwealth v. DeHart, 512 Pa. 235, 248, 516 A.2d 656, 663 (1986), cert. denied, ____ U.S. _____, 107 S.Ct. 3241 (1987). (emphasis supplied).

The only relevant inquiry in making such a determination is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath'." Wainwright . Witt, 469 U.S. 412 (1985), quoting Adams v. Texas, 448 U.S. 38, 45 (1980). It must be noted that a state can remove those jurors who would

"frustrate the State's legitimate interest in administering constitutional capital sentencing schemes by not following their oaths." Witt, 469 U.S. at 423. The record in the case at bar clearly indicates that Juror Number 102 could not temporarily set aside her own beliefs in deference to the rule of law. See Lockhart v. McCree, 476 U.S. 162 (1986). Any further inquiry in this regard was unnecessary.

This Court, in Witt, 469 U.S. at 426, noted that there will be situations where a trial judge is left with definite impressions that a prospective juror would be unable to faithfully and impartially apply the law. This is why deference must be paid to the trial judge who see and hears the juror. Further, this Court, in Witt, found that a state court's determination to excuse a juror for cause was finding of fact and was therefore subject to a presumption of correctness accorded by 28 U.S.C. Section 2254 (d) to state court findings of fact in federal habeas corpus proceedings. Id. See Patton v. Yount, 467 U.S. 1025 (1984).

The petitioner in the within case also relies on Gray v. Mississippi, ____ U.S. _____, 107 S. Ct. 2045 (1987), to support his position relative to this issue. This reliance is misplaced. In Gray, this Court considered a trial court's exclusion for cause a juror who, although initially expressing conscientious scruples against the death penalty, ultimately stated that she could consider the death penalty in an appropriate case. As demonstrated by the record, the facts and issues in Gray are clearly distinguishable from the case sub judice. Based upon the facts and authority cited herein, the Petition for Writ of Certiorari must be denied.

II.

The Pennsylvania death penalty statute is not unconstitutional, despite its mandatory language, because adequate safeguards are contained therein. The relevant portion of the statute to this issue is: "the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance...and no mitigating circumstances...", 42 Pa. C.S.A. Section 9711 (c) (1) (iv). The authority cited by petitioner, primarily Eddings v. Oklahoma, 455 U.S. 104 (1982), and Hitchcock v. Dugger, _____ U.S. _____, 107 S. Ct. 1821 (1987), involve the issue of considering any relevant "mitigating circumstances" when making such a determination. In the case sub judice, no "mitigating circumstances" were presented by the petitioner.

In the absence of same, and having found the petitioner guilty of robbery and a concomitant homicide, the jury properly sentenced the petitioner to death.

The argument set forth by the petitioner herein was expressly refuted in Commonwealth v. Peterkin, 511 Pa. 299, 326-328, 513 A.2d 373, 387-388 1986), cert denied, _____ U.S. _____, 107 S.Ct. 962 (1987). The Pennsylvania Supreme Court, in Peterkin, held that

> "(a)lthough it is true that the Pennsylvania death penalty statute does not allow a jury to avoid imposition of a death sentence through the exercise of an unbridled discretion to grant mercy or leniency, the statute permits the defendant to introduce a broad range of mitigating evidence (42 Pa. C.S.A. Section 9711 (e)) that can support the finding of one or more mitigating circumstances which may outweigh the aggravating circumstances (42 Pa. C.S.A. Section 9711 (d)) found by the jury. Appeals for mercy and leniency can be founded upon and made through introduction of evidence along this broad spectrum of mitigating circumstances. The channelling of considerations of mercy and leniency into the scheme of aggravating and mitigating circumstances is consistent with the mandate of Furman v. Georgia, 408 U.S. 238 (1972), reh. denied, 409 U.S. 902 (1972), that the discretion of the sentencing body in capital cases "be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Gregg v. Georgia, 428 U.S. 153, 189 (1976), reh. denied, 429 U.S. 875 (1976).
>
> ....Lockett v. Ohio, 438 U.S. 586 (1978), does not require that the sentencing body be given discretion to grant mercy or leniency based upon unarticulable reasons. Lockett holds "that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Id., 438 U.S. at 604. (emphasis in original). The Pennsylvania statute (42 Pa. C.S.A. Section 9711 (e)(8)) clearly permits consideration of such evidence.... Thus, we find no merit to appellant's constitutional challenges to the Pennsylvania death penalty statute."

It must be noted that the Pennsylvania death penalty statute requires that a jury's decision in rendering a death sentence be unanimous, and if a unanimous verdict cannot be reached with regard to same, a court must then sentence the defendant to life imprisonment. See 42 Pa. C.S.A. Sections 971 (c) (1) (iv) and 9711 (c) (1) (v). Also, 42 Pa. C.S.A. Section 9711 (h) (1) provides that a death sentence is automatically reviewed by the

Pennsylvania Supreme Court. It is because of these provisions of the Pennsylvania death penalty statute, as recited hereinabove, that "(j)ury discretion is thus neither eliminated, nor unduly limited, but rather is channeled in order to ensure that the death penalty will be imposed in a consistent and rational, as opposed to an arbitrary and capricious, manner" (See petitioner's A---134-135). See Commonwealth v. Zettlemoyer, 500 Pa. 16, 454 A.2d 937 (1982), cert. denied, 461 U.S. 970 (1983), reh. denied, 463 U.S. 1236)1983).

Based upon the facts and authority cited herein, the Petition for a Writ of Certiorari must be denied.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respecfully submitted,

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CERTIFICATE OF SERVICE

I, RUSSELL B. KORNER, JR., Esquire, being a duly admitted member of the Bar of this Court, hereby certify that a copy of the Brief In Opposition to Petition for Writ of Certiorari to the Supreme Court of Pennsylvania, was served on petitioner's counsel, Samuel J. Davis, Esquire, and John M. Purcell, Esquire, Davis and Davis, 107 East Main Street, Uniontown, Pa. 15401, on March 3, 1989, by personal service.

Respectfully submitted,

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DATE: March 3, 1989